

# MEMORANDUM

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To: Tom Porta, Deputy Administrator  
From: Jason Kuchnicki, Lake Tahoe Watershed Unit Supervisor  
Re: Nevada Lake Tahoe TMDL Allocation and Implementation Approach  
Date: March 20, 2008

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## **Purpose**

A Nevada Lake Tahoe Total Maximum Daily Load (TMDL) Implementers meeting was held on March 20<sup>th</sup>, 2008. Part of the TMDL stakeholder input process, the purpose of the meeting was to solicit feedback from the Nevada implementer community regarding the regulatory approach to be pursued by NDEP upon approval of the final TMDL. The purpose of this memorandum is to document the input received. This information will be considered in the selection of an allocation and implementation approach for the Final TMDL document.

## **Background**

NDEP is faced with the decision regarding the regulatory approach towards the urban uplands source category. The issue is whether it makes sense to regulate stormwater runoff from urban areas through the National Pollutant Discharge Elimination System (NPDES) stormwater program. This program requires any jurisdiction that meets specific population and density requirements to obtain municipal stormwater permit. The permittee is required to develop a comprehensive program to address stormwater runoff within their jurisdiction.

Although the urban area within Nevada Lake Tahoe does not meet the population and density requirements that trigger automatic inclusion within Nevada's stormwater program, the Clean Water Act gives NDEP authority to designate jurisdictions for inclusion on the basis that urban stormwater runoff has been determined the main source of the pollutants that control lake clarity. Therefore, issuance of NPDES stormwater permits is a feasible regulatory approach for TMDL implementation. Exactly, how the permits would be structured and which governmental entities would be named on the permit would need to be investigated further.

A second option presented was the concept of a Memorandum of Implementation (MOI). Conceptually, this would be an agreement between the governmental entities (yet to be determined) within Lake Tahoe and NDEP that would include a strategic plan for a comprehensive program to address stormwater planning, implementation, operations and maintenance. The agreement would be quasi-regulatory in nature, in that it would specify load allocations and associated implementation milestones for each of the jurisdictions. However, the agreement would not focus on a command and control approach; instead this approach would rely on local jurisdictions to perform actions because they have acknowledged it is the right thing to do.

## **Discussion**

In order to frame and provide context for the discussion, a number of issues and the associated benefits and/or drawbacks with each option presented (Attachment 1). Despite the many beneficial elements that a stormwater program could bring, some main advantages of the MOI over the permit system were identified and discussed:

1. NPDES permitting could add an additional layer of unnecessary bureaucracy to an already complex political and regulatory environment. It is a national approach that may not be the best fit for Lake Tahoe and potentially may not offer as much flexibility for customization as the MOI. Efficiencies gained using an MOI approach would mean less money diverted from implementation, operations and maintenance and monitoring activities to meet potentially unproductive NPDES programmatic requirements.
2. The MOI may be a more favorable approach in terms of granting flexibility in the timeframe to achieve water quality objectives. Permits bind the permittee to meeting the specified requirements, regardless of consideration of current economic conditions, which is a factor in the level of effort accomplished by implementation agencies. Moreover, because (a) the innovative and advanced practices called for in the TMDL have the potential to be very costly (in terms of both of capital and operations and maintenance) and (b) limited field experience and effectiveness data exist for these controls, innovation is likely to proceed cautiously until the widespread success and cost-effectiveness has been demonstrated.
3. Permits could preclude eligibility of local jurisdictions to receive certain grant funds if activities are specified as requirements of the permit;
4. Whereas enacting permits may discourage a collaborative working relationship between regulatory and implementation agencies, the MOI may act to foster cooperative relationships. Consequently, since they may not feel like they are being bossed around, local jurisdictions may be more compelled to focus on combating the problem rather than the permit/regulatory agency.

Based on the discussion regarding the stormwater permitting, there seemed to be general consent that the MOI offers greater flexibility toward implementation. Some concerns regarding enforceability of this approach were expressed; it was reasoned that without enforcement, gains in water quality improvement may never be realized. However, it was pointed out that the Administrative Orders of Consent that NDEP has entered into with other jurisdictions describes the measures to be taken if specific actions are not occurring or targets are not being met within a reasonable timeframe. A remedial action that could be included in a similar agreement in this case could be the issuance of stormwater permits to a jurisdiction demonstrating uncooperativeness.

## **Other Discussion Items**

A third implementation approach option was identified at the meeting. This option had TRPA as the regulatory authority for TMDL implementation. The advantage identified was that it would

take advantage of the existing regulatory structure in the Lake Tahoe Basin and would minimize duplication of efforts as the TRPA is already looking to integrate the completed TMDL implementation plan and future crediting system into their Regional Plan Update. This approach seems to make sense, because the bi-state compact charges TRPA with water quality protection in the basin. One potential complication is that NDEP retains authority over the Clean Water Act within NV Lake Tahoe. Therefore, NDEP would likely maintain some involvement in basin activities, particularly with respect to those entities (i.e., NDOT) already subject to stormwater permitting requirements. It stands to reason then that if the MOI approach is chosen, TRPA and NDEP should both be signatory agencies to the agreement.

### **Next Steps**

Once approved, this memo will be distributed to the meeting attendees (Attachment 2) who will circulate the memo to the heads of their organizations to solicit any additional input. NDEP shall ask for this feedback to be received by May 15<sup>th</sup>, 2008. This input will be further considered in the selection of a recommended implementation and allocation approach to be pursued by NDEP. Because this recommended approach will be used to craft implementation and allocation plan components of the Final TMDL, there is the need for NDEP to consult with and receive buy-in from our partner agencies with whom we are developing and gaining approval of the TMDL, respectively the Lahontan Water Board and USEPA. Once this buy-in has been confirmed, the final TMDL document will be written based on this regulatory approach.

## Attachment 1

### Benefits and Drawbacks of TMDL Regulatory Approach Options

Issue	Stormwater Permit	Memorandum of Understanding
Program Development	Mandate development of comprehensive stormwater programs by each jurisdiction to address environmental issue	Could serve as tool to support development of comprehensive stormwater program to address an environmental issue
Financial Leveraging	Serves as justification for local jurisdictions to develop finance mechanisms (stormwater tax, etc.)	Although may serve as justification to develop finance mechanisms; may carry less weight than a mandate & therefore program could be more easily see cuts during economic hardship.
Grant Funding Eligibility	May preclude eligibility to receive grant funds if activities are requirements of permit	Eligibility to receive grant funds not precluded.
Implementation Timeframe	Once written into permit, little ability to account for economic conditions and/or rate of technological advancement	Ability to account for economic conditions and/or pace of technological advancement.
Customizability	Lack of customizability may result in lost efficiencies	Customizability may result in gains in efficiencies
Equity	Fair & equitable playing field may diffuse/minimize resistance to implementation	If viewed by other implementation agencies as inequitable, could lead to resistance in implementation, delayed implementation or lawsuits
Regulatory Enforcement	May provide regulatory agencies legal capacity and support for compliance enforcement	May not provide legal capacity and support for compliance enforcement
Regulatory Support	Fees guarantee financial support for increased workload incurred by regulatory agency	Could serve as a tool to gain financial support for increased workload incurred by regulatory staff
Approach Effectiveness	Command and control approach may cause jurisdictions to focus on combating the permit rather than the problem	Because the approach fosters the establishment of a partnership between regulatory and implementation agencies, more work may get done sooner
Incentives	Permits may be required in order to implement trading system	Potentially may not support trading system
Tracking, Crediting & Monitoring	Basin-wide consistency may better support these continuous improvement and adaptive management programs	Could support continuous improvement and adaptive management
Public Perception	May be viewed as NV doing its part to clean up this ONRW	Potential to be portray feeling of apathy on part of NV
Previous Public Input	Consistent with Forum feedback calling for uniform approach to water quality in the basin	Inconsistent with Forum feedback has potential to be viewed as ignoring public sentiment; however
Final TMDL Approval	May be required for TMDL approval by EPA	Approach may not provide EPA with "reasonable assurance" of TMDL implementation within Nevada
Program Coordination	Facilitates jurisdictions to work together to gain cost-efficiencies and determine the best solution	Facilitates jurisdictions to work together to gain cost-efficiencies and determine the best solution

Attachment 2

3/20/08 NV Lake Tahoe TMDL Implementers Meeting Attendance

# SIGN IN

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